Supreme Court, U.S.
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No. 02-983

In the
Supreme Court of the United States

FRANK CASS,

Petitioner,

v.

PATRICIA LOVE STEPHENS, INDIVIDUALLY AND AS TRUSTEE OF THE WALTER H. STEPHENS TRUST, THE SSH TRUST, THE SUTTON ELIZABETH STEPHENS IRREVOCABLE TRUST, and THE HEATHER LOVE STEPHENS IRREVOCABLE TRUST,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS SUPREME COURT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TURNER, DAVIS & GERALD
John A. "Jad" Davis (Counsel of Record)
Brandy R. Manning
Attorneys for Respondents, Patricia Love Stephens, et al.
400 W. Illinois, Suite 1400
Midland, TX 79701
(432) 687-0011

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

A. *Campbell* did not outlaw the "eyebrow" test. 1

B. *Campbell* did not alter the standard of review applicable to punitive damages awards. 4

C. *Campbell* did not make it impermissible to consider Cass's wealth. 5

D. The Court of Appeals did not consider out-of-state or dissimilar conduct. 8

CONCLUSION & PRAYER FOR RELIEF 9

TABLE OF AUTHORITIES

FEDERAL CASES

BMW v. Gore,
517 U.S. 599 (1996) 2, 5, 7

Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) 4

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 7

State Farm Mutual Life Ins. Co. v. Campbell,
123 S.Ct.1513 (2003) 1, 2, 4-7, 9

TXO Production Corp. v. Alliance Resources Corp.,
509 U.S. 443 (1993) 2-7

STATE CASES

Cass v. Stephens,
2001 WL 28092 (Tex. App.— El Paso 2001,
pet. denied) 2-7

FEDERAL RULES

SUP. CT. R. 14(1)(A) 4

INTRODUCTION

This supplemental brief is necessary to respond to Petitioner Cass's arguments regarding *State Farm Mutual Life Ins. Co. v. Campbell*, 123 S.Ct.1513 (2003) which was decided by this Court after Petitioner's brief was filed. Although Respondent Mrs. Stephens discussed this case briefly in her Brief in Opposition to the Petition for Writ of Certiorari, Mrs. Stephens has not had the opportunity to respond to Cass's arguments. This brief is limited to responding to Cass's arguments with respect to *Campbell*.

ARGUMENT

Cass argues that *Campbell* impacts this case, and that it should be remanded so that the Court of Appeals can reevaluate the punitive damages award in light of this Court's most recent pronouncements in *Campbell*. But *Campbell* introduces nothing that would change the lower court's review in this case. For this reason, this Court should end Mrs. Stephens' seventeen-year struggle to obtain justice in this case and deny Cass's petition.

A. *Campbell* did not outlaw the "eyebrow" test.

Cass notes that the Texas Court of Appeals applied the "eyebrow" test to the punitive damages award in this case.[1] (Reply at 4). The Court of Appeals, recognizing this Court's hesitancy to impose a bright-line, formulaic rule regarding the

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[1]Cass claims that Stephens attempted to "mislead" this Court by asserting that the ratio of punitive damages to actual damages is 6 to 1. (Reply at 3.) Because the breach of contract damages were significant, at first glance it appears that the ratio is much smaller than 25 to 1. Providing both ratios was an attempt to explain, not mislead.

ratio of punitive damages to actual damages, cited the "eyebrow test" applied in *BMW v. Gore*, 517 U.S. 599 (1996) —"[w]hen the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow." *Cass*, 2001 WL 28092, *32 (Tex. App.— El Paso 2001, pet. denied). Noting that "evidently, we will know [a grossly excessive award] when we see it," the Court of Appeals was not "shocked" by the punitive damages award in this case. *Id.*

Cass misunderstands *Campbell*. This Court did not introduce a bright-line rule; in fact, it expressly "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed." *Campbell*, 123 S. Ct. at 1524. In accordance with earlier punitive damages jurisprudence, this Court reaffirmed that "the precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* The Court stated that "our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 1524. This is hardly an unequivocal statement that *all* awards with greater than single digit ratios are impermissible, as Cass seems to imply.

In fact, this Court has upheld a punitive damages award greatly exceeding a single digit multiplier of actual damages. In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) this Court upheld a punitive damages award 526 times the actual damages awarded. Thus, if *Campbell* really set a bright-line rule prohibiting ratios greater than 9 to 1, *Campbell* effectively overruled *TXO*. And there is no indication that this Court intended to overrule *TXO*; in fact, it was repeatedly cited with approval in *Campbell*.

The key to the large ratio in *TXO* is the character of petitioner's conduct. Justice Stevens, writing for the plurality, stated:

> In sum, we do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. . . . The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.

TXO, 509 U.S. at 462 (plurality opinion). Furthermore, Justice Kennedy concurred based on the fact that TXO acted with malice. *Id.* at 468 (J. Kennedy, concurruing). He noted that the case was not one concerning negligence, strict liability, or *respondeat superior*, but one where senior officers of the company committed intentional torts. *Id.*

The facts in this case demonstrate the same disregard for the rights of others and for the law as this Court found so distasteful in *TXO*. Cass intentionally and continually cheated an vulnerable widow who considered him a friend and placed her personal trust in him. Contrary to Cass's statement that the Texas Court of Appeals did not take into account whether Cass's conduct was "so reprehensible that it justified a departure from the norm," the court wrote a 35 page, 19,000 word opinion detailing the evidence supporting the punitive damages award. *See Cass*, 2001 WL 28092 (Tex. App.—El Paso 2001, pet.

denied). The Court of Appeals, in its evaluation of the punitive damages award in this case, echoed the plurality's sentiments in *TXO*:

> [Cass] intentionally and deliberately defrauded and converted the property of [Mrs. Stephens'] for [his] own personal benefit. Fraud and conversion are ancient wrongs which are roundly denounced and receive little public sympathy. Here, the facts are egregious and show a deliberate attempt by [Cass] to escape responsibility for [his] wrongful conduct.

Cass, 2001 WL 28092 at *32. Considering the reprehensibility of the conduct and the ratios together, the Court concluded that the punitive award in this case was not unreasonable. *Id.* Considering Cass's conduct in light of *TXO*, this case is one of the "few" acknowledged by this Court in *Campbell*. For this reason, the petition should be denied.

B. *Campbell* did not alter the standard of review applicable to punitive damages awards.

Cass argues that the petition should be granted because the Texas Court of Appeals did not conduct a *de novo* review of the punitive damages award. (Reply at 6). Cass acknowledges, however, that *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) stated that appellate courts should conduct a *de novo* review; such a requirement is not new to *Campbell*. Thus, this point could have been raised in Cass's petition. Since it was not, it should not be considered by this Court. SUP. CT. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

Furthermore, the Texas Court of Appeals did apply a heightened standard of review. Though it never used the words "*de novo*," it stated that "despite our analysis, *BMW* evidently requires a more stringent judicial review of the jury's verdict upon a contention that the ratio of exemplary to actual damages exceeds a constitutionally acceptable range." *Cass*, 2001 WL 28092 at *32. Thus, even though it had detailed Cass's wrongful conduct over the previous 30 pages, it again considered the facts and the award in light of this Court's punitive damages jurisprudence. *Id.* It applied the *Gore* factors and concluded that on the record in this case, the punitive damages award passed constitutional muster. *Id.* at 32-33.

C. *Campbell* did not make it impermissible to consider Cass's wealth.

Campbell does not make it impermissible to consider the financial condition of a defendant. Cass quotes from *Campbell*: "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (Reply at 8 (quoting *Campbell*, 123 S.Ct. at 1525)). However, *Campbell* continues: "Wealth provides an open-ended basis for inflating awards when the defendant is wealthy . . . . *That does not make its use unlawful or inappropriate*; it simply means that this factor cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." *Campbell*, 123 S. Ct. at 1525 (quoting Justice Breyer's concurrence in *Gore*, 517 U.S. at 591) (emphasis supplied). Furthermore, in *TXO*, this Court noted that evidence of the defendant's net worth is typically considered in assessing punitive damages and that Alabama's punitive damages factors, which it had previously cited with approval in *Haslip*, included the "financial position" of the defendant. *TXO*, 509 U.S. at 462. In *TXO*, the petitioner's

wealth was explicitly taken into account in determining whether the punitives award was "grossly excessive." *Id.* Again, *Campbell* indicates no intention to overrule *TXO* in any way.

Not only is consideration of the defendant's financial position permitted, it might be required. For a punitive damages award to be effective punishment and at the same time, not be grossly excessive, the defendant's financial position must be considered. Clearly, an award that punishes and deters an individual of modest means might mean little to a multi-million dollar corporation. Similarly, what might be reasonable for a national corporation could be grossly unreasonable for an average individual. While this Court stated that the defendant's wealth could not save an otherwise unconstitutional award, it is not impermissible, and is probably advisable, to consider the defendant's financial position in reviewing a punitive damages award.

Furthermore, Cass argued in the Court of Appeals that the jury impermissibly *disregarded* relevant evidence regarding his financial ability. *Cass*, 2001 WL 28092 at *31; Appellant Frank W. Cass's Brief at p. 33 ("relevant evidence, such as Mr. Cass's net worth . . . was disregarded by the jury."). Cass testified that he had a negative net worth after the compensatory damages award; he argued that the jury disregarded his testimony. *Id.* In this Court, however, he argues that evidence of his wealth should have been disregarded.

The Court of Appeals discussed Cass's testimony regarding his wealth and his argument that the jury impermissibly disregarded it. *Id.* It first noted that the jury did not find Cass to be a very credible witness—it resolved almost every issue of disputed fact against him. *Id.* The Court of Appeals then listed some of the evidence supporting the

allegation that he was a man of means—it noted that Cass ran a company which handled over $30 million in business, that he owned interests in a number of affiliated companies, that he was a joint owner of a Lear jet, that he acted as a surety on a number of loans for his children, and that the companion wells (developed through his illicit conduct against Mrs. Stephens) were sold for $12 million. *Id.* Cass is really arguing that the jury should have disregarded what he considers unfavorable evidence and accepted his version of the facts.

Furthermore, this is not a case such as *Campbell* where there is a real danger that the jury might be prejudiced against a huge corporation without a local presence; this was the Court's concern in *Campbell* as well as in *Gore*. *Campbell*, 123 S.Ct. at 1525 (*citing Gore*, 517 U.S. at 585). The defendant in this case was an independent businessman with local ties. Under these circumstances, it is less likely that a jury will inflate an award based primarily on the wealth of the defendant.

Cass may be arguing not that his wealth was improperly considered, but that this Court should not take into account the wealth garnered by the sale of the companion wells, which were financed and developed in large part by the money and equipment Cass stole from Mrs. Stephens. But this Court has cited with approval the Alabama punitive damages statute; one of the factors it prescribes is "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22. Similarly, in *TXO*, the potential gain to the defendant had its elaborate scheme succeeded was considered. *TXO*, 509 U.S. at 461. Cass

sold the companion wells for $12,000,000.[2] The fact that the punitive damages awarded against him was less than half of the funds received by the sale of the wells further supports the reasonableness of the punitive damages award. This fact makes this case unique.

D. The Court of Appeals did not consider out-of-state or dissimilar conduct.

Again, *Campbell* did nothing new in terms of stating what conduct may not be considered—this Court has made it clear that out-of-state or dissimilar conduct may not be considered. Thus, *Campbell* would not later the Court of Appeals' analysis on that basis.

The Court of Appeals considered neither out-of-state conduct nor dissimilar conduct—there was ample evidence of Cass's wrongful conduct against Mrs. Stephens to support the punitive damages award.[3]

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[2]Cass states that the fact that the wells in question were sold for $12 million is "completely unsupported by any competent evidence in the record." But Mrs. Stephens' expert testified that Cass and his sons sold the companion wells to Parker & Parsley for $12,000,000. XXIII:97:9016. Furthermore, the Court of Appeals also considered the $12,000,000 sale in its opinion. *See Cass*, 2001 WL 28092 at *28, *31. Cass also claims that the only "competent" evidence at trial showed that Cass received little or no net proceeds from the sale. Interestingly, he does not cite to the record to support this statement.

[3]Cass claims that the jury was "heavily influenced by the $978,492.10 in sanctions imposed by the trial court against Cass for alleged misconduct during the litigation." (Reply at 8). But the relief awarded for Cass's discovery abuse was never before the jury—the trial court vacated the sanctions award before trial and revisited the

What *Campbell* expressly denounced was the use of punitive damages awards to "expose and punish" a nationwide pattern of conduct. That was the key to *Campbell*:

> This case was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. . . . The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct directed toward the Campbells. . . . This was, as well, an explicit rationale of the trial court's decision in approving the award . . . .

Campbell at 9.

There is no allegation that the punitive award here was used as a platform for anything. They jury simply exercised their option to punish Cass for his egregious conduct against Mrs. Stephens. The award was based on Cass's fraudulent conduct against Mrs. Stephens and nothing else.

CONCLUSION & PRAYER FOR RELIEF

For seventeen years, Mrs. Stephens has fought to bring Cass to justice. She made it through eleven years of pretrial proceedings, including multiple mandamus actions, interlocutory

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issue in a post-trial hearing.

Mrs. Stephens' argument regarding dissimilar conduct was more fully addressed in Mrs. Stephens' Brief in Opposition at p. 18, FN 21. In the interest of limiting this brief to Cass's arguments regarding *Campbell*, it will not be reurged here.

appeals, weeks of discovery hearings, a six-week sanctions hearing, a two-week hearing on a motion to exclude or suppress evidence, numerous pretrial motions including a motion to disqualify plaintiffs' counsel, a motion to disqualify plaintiffs' expert, and eight motions for summary judgment. (Brief in Opposition at pp. 1-2 and accompanying footnotes). Mrs. Stephens was sued three times, and her attorneys, investigators, and experts were also sued. *Id.* at p. 3. But Mrs. Stephens did not give up. Twelve jurors sat through a month-long trial and when it was over, they did two things. They awarded compensatory damages, affirming Mrs. Stephens' contention that she had been taken advantage of by Cass. They also awarded punitive damages for the purpose for which they were intended—to punish Cass for his reprehensible conduct and deter similar conduct in the future. Then, the verdict withstood vigorous appellate review in what has become one of the most conservative appellate judiciaries.

But Cass refuses to accept that he's been caught and punished. He comes before this Court, not arguing that he was wrongly punished, but that his conduct was not quite as reprehensible as the jury thought it was. He asks this Court to send Mrs. Stephens back into the Texas state court system for another four or five years after having fought for seventeen years to end the dispute between them. To remand this case and send Mrs. Stephens back into the Texas court system would be a travesty of justice.

If this Court chooses to grant Cass's petition, then Mrs. Stephens urges this Court to affirm the Court of Appeals' decision. This case really is different—the facts of this case, including Cass's sale of the companion wells for more than twice the amount of the punitive damages awarded against him, make it instructive for lower courts. This case might be the

exception to the rule, but an affirmance in this case would provide guidance to lower courts trying to grasp what the rule really is.

For these reasons, Mrs. Stephens prays that this Court deny Cass's petition for writ of certiorari and for such other relief at law or in equity to which Mrs. Stephens may be justly entitled.

Respectfully submitted,

TURNER, DAVIS & GREALD
A Professional Corporation
400 W. Illinois, Suite 1400
P. O. Box 2796
Midland, Texas 79702
(915) 687-0011
FAX (915) 687-1735

By: Jad Davis (w/permission)
John A. "Jad" Davis
State Bar No. 05511400
Brandy R. Manning
State Bar No. 24029703

ATTORNEYS FOR RESPONDENTS